

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

WENDY W. GRIFFIN,  
*Plaintiff,*

v.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,  
*Defendant.*

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Civil Action H-07-658

**MEMORANDUM AND RECOMMENDATION**

Plaintiff Wendy W. Griffin's claim for disability and supplemental security income benefits under the Social Security Act is before the court on cross motions for summary judgment.<sup>1</sup> Because the ALJ erred as a matter of law by failing to develop an adequate record for an informed decision regarding her mental impairment, the Commissioner's decision should be REVERSED and the case REMANDED for further proceedings pursuant to 42 U.S.C. § 405(g), sentence four.

**Factual and Procedural Background**

Griffin originally filed for disability and supplemental benefits on September 16, 2003, alleging a disability onset date of April 6, 2003. Upon denial of her claim and request for reconsideration, she requested and received a hearing before an administrative law judge on December 21, 2005 in Houston, Texas. On January 26,

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<sup>1</sup> Dkt. 13, 14. The case has been referred to this magistrate judge for report and recommendation. Dkt. 10.

2006, the ALJ found that Griffin did not suffer from a disability within the meaning of the Act. The Appeals Council subsequently denied review, leaving the ALJ's decision as the Commissioner's final decision. Griffin timely sought judicial review in this court.

Griffin was 38 years old at the time of her hearing in 2005. She has less than a high school education, having completed studies through the 11<sup>th</sup> grade. Her past relevant work experience includes customer service representative, fast food manager, production specialist, and sales associate/cashier.

Griffin's disability claim initially centered upon physical impairments pertaining to her right hand and arm: carpal tunnel syndrome, tendinitis, ganglion cyst, and arm pain.<sup>2</sup> She has suffered with the effects of a ganglion cyst in her right hand for some time. On March 5, 2002, she suffered an on the job injury to her right hand and wrist while attempting to open a box. Over the next few years she received an extensive amount of medical treatment, including surgery, to relieve these conditions affecting her right side. The ALJ agreed that these "various diagnoses and conditions of the right hand, arm, and shoulder," together with her obesity and "status post cyst surgery," constituted severe physical impairments under the applicable Social Security regulations. Because the ALJ's findings pertaining to Griffin's

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<sup>2</sup> Tr. 21. She also claimed disability based on obesity.

physical impairments are not at issue here,<sup>3</sup> there is no need to burden this opinion with an extensive recitation of the medical evidence pertaining to those impairments.

The crux of this appeal concerns Griffin's mental impairment. In April 2005, Griffin began receiving psychiatric care from Dr. G. K. Ravichandran at Shamrock Psychiatric Clinic. She experienced symptoms of depression, anxiety, panic attacks, migraine headaches, delusions, and hallucinations.<sup>4</sup> At the direction of Dr. Ravichandran, Griffin underwent a nuclear brain scan at Hermann Hospital in July 2005, which revealed an abnormal focal decrease of 10% in the right parietal region compared to the left.<sup>5</sup> She was diagnosed with organic brain syndrome secondary to silent stroke.<sup>6</sup> Another treating physician, neurologist Martin Rossi, recorded that Griffin experienced "some memory problems, forgetful, confused."<sup>7</sup> Lay testimony corroborating Griffin's claims of short term memory loss and frequent debilitating crying spells was offered by her sister, Robin Thompson, who had moved next door

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<sup>3</sup> Griffin does challenge the ALJ's residual functional capacity finding, but primarily because it does not adequately account for the combined impact of her physical and mental impairments. Because the remand will necessarily entail a reassessment of Griffin's RFC in light of these impairments, there is no need to address that issue here.

<sup>4</sup> Tr. 275.

<sup>5</sup> Tr. 271, 283.

<sup>6</sup> Tr. 337.

<sup>7</sup> Tr. 280.

to the claimant to provide daily care and assistance with ordinary tasks such as getting dressed.<sup>8</sup>

The ALJ expressly found that Griffin suffered from “organic brain syndrome” which met the requirements of a “severe” mental impairment under Social Security regulations. *See* 20 C.F.R. §§ 404.1520 and 416.920. However, this mental impairment was found not to meet or equal the level of severity required for any impairment listed in Appendix 1 to Subpart P, Regulation No. 4. The sole support for this finding is the following conclusory sentence:

[T]he claimant’s mental impairment has a **moderate** impact upon her ability to perform daily activities, maintain social functioning, and maintain ‘concentration, persistence, or pace’ with no episodes of deterioration or decompensation in work or work-like settings and no evidence to support a documented history of a mental disorder of at least two years’ duration that has caused more than a minimal limitation of ability to do any basic work activity.<sup>9</sup>

The finding of a “moderate” as opposed to a “marked” limitation on daily activities, social functioning, and concentration is critical here, because a “marked” level of severity would have triggered a finding of disability under Listing 12.02 for organic

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<sup>8</sup> Tr. 400-02.

<sup>9</sup> Tr. 22.

mental disorders.<sup>10</sup> The ALJ gave no justification for classifying Griffin's limitations as "moderate" rather than "marked."<sup>11</sup>

The ALJ dismissed Griffin's claimed symptoms and limitations as not generally credible. He found Griffin retained the residual functional capacity to perform a wide range of light work with maximum lifting of twenty pounds occasionally, ten pounds frequently. This capacity was reduced by certain physical limitations regarding her right upper extremity, as well as limited contact with the public, supervisors, and coworkers, and working with minimal stress, "defined as non-assembly line pace work."<sup>12</sup> Although unable to perform any of her past relevant work, Griffin was found able to perform jobs existing in significant numbers in the national economy, based on her age, work experience, and residual functional capacity. Examples of such jobs included plumbing hardware assembler, folding machine operator, packing

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<sup>10</sup> The required level of severity for a Listing 12.02 organic mental disorder is met when the requirements of two criteria are satisfied: Criterion A involves persistent loss of cognitive abilities or affective changes, such as memory loss, hallucinations, or emotional ability; Criterion B involves at least two of the following limitations: marked restriction of daily living activities, marked difficulties in maintaining social functioning, marked difficulties in maintaining concentration, persistence, or pace, and repeated episodes of decompensation. *See* 20 C.F.R. Part 404, Subpt. P, App. 1, Listing 12.02.

<sup>11</sup> The regulations generally define "marked" as "more than moderate but less than extreme," and provide additional guidance on how to assess severity of functional limitations due to mental disorder. *See* Listing 12.00(C).

<sup>12</sup> Tr. 28.

machine operator, stamping machine operator, and information clerk.<sup>13</sup> Accordingly, the ALJ concluded that Griffin was not disabled under the Act, and denied her claim for benefits.

### **Standard of Review**

Section 405(g) of the Social Security Act sets forth the standard of review in this case. The federal courts review the decision of the Commissioner to deny Social Security benefits to determine whether (1) the Commissioner applied the proper legal standard and (2) the Commissioner's decision is supported by substantial evidence. *Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002); *Masterson v. Barnhart*, 309 F.3d 267, 272 (5th Cir. 2002). Substantial evidence is "more than a scintilla and less than a preponderance." *Masterson*, 309 F.3d at 272; *Newton v. Apfel*, 209 F.3d 448, 452 (5th Cir. 2000). The court does not reweigh the evidence, try the questions *de novo*, or substitute its own judgment for that of the Commissioner. *Masterson*, 309 F.3d at 272. "Conflicts in the evidence are for the [Commissioner] and not the courts to resolve." *Selders v. Sullivan*, 914 F.2d 614, 617 (5th Cir. 1990).

In order to qualify for disability benefits, a plaintiff must prove she has a disability, which is defined under the Social Security Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical

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<sup>13</sup> *Id.*

or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §§ 423 (d)(1)(A) and 1382c(a)(3)(A); *Masterson*, 309 F.3d at 271. The administrative law judge must follow a five-step sequential analysis to determine whether a plaintiff is in fact disabled:

1. Is the claimant currently engaged in substantial gainful activity, *i.e.*, working? If the answer is yes, the inquiry ends and the claimant is not disabled.
2. Does the claimant have a severe impairment? If the answer is yes, the inquiry proceeds to question 3.
3. Does the severe impairment equal one of the listings in the regulation known as Appendix 1? If so, the claimant is disabled. If not, then the inquiry proceeds to question 4.
4. Can claimant still perform his past relevant work? If so, the claimant is not disabled. If not, then the agency must assess the claimant’s residual functional capacity.
5. Considering the claimant’s residual functional capacity, age, education, and work experience, is there other work claimant can do? If so, claimant is not disabled.

20 C.F.R. §§ 404.1520, 416.920; *Waters*, 276 F.3d at 718. At step five, the burden shifts to the Commissioner to show that employment for the claimant exists in the national economy. *Wren v. Sullivan*, 925 F.2d 123, 125 (5th Cir. 1991).

### Analysis

An administrative law judge has the duty “to develop the facts relative to a claim for benefits fully and fairly.” *Kane v. Heckler*, 731 F.2d 1216, 1219 (5th Cir. 1984). Otherwise, the record will lack sufficient facts on which to make an informed decision, and the decision will not be supported by substantial evidence. *Davis v. Califano*, 599 F.2d 1324, 1327 (5th Cir. 1979). This duty includes consultation with a qualified psychiatrist or psychologist when there is evidence of mental impairment. 20 C.F.R. §§ 404.1503(e), 416.903(e).

The ALJ has a separate though related duty to discuss the evidence of a claimant’s impairments and resulting limitations, and to explain the reasons for an adverse determination. 42 U.S.C. § 405(b)(1). Failure to comply with this obligation is legal error. *See Audler v. Astrue*, 501 F.3d 446, 448 (5th Cir. 2007) (“Although the ALJ is not always required to do an exhaustive point-by-point discussion, in this case, the ALJ offered nothing to support her conclusion at this step [three] and because she did not, we, as a reviewing court, simply cannot tell whether her decision is based on substantial evidence or not.”) (internal quotation and citation omitted).

The ALJ violated both legal duties here. He found that Griffin suffered from a severe mental impairment, diagnosed as organic brain syndrome. Although not cited, ample medical evidence supports this finding, including an abnormal nuclear



brain scan and a statement from Dr. Ravichandran, her treating psychiatrist.<sup>14</sup> Yet, the ALJ proceeded to conclude, without discussing or even citing record evidence, that this mental impairment did not meet or equal the listing requirements for a disabling organic mental disorder. Absent such a discussion, meaningful judicial review of a step 3 denial is impossible. *Audler*, 501 F.3d at 448.

Moreover, any discussion of Griffin's mental impairment and limitations based on this record would necessarily have been inadequate, because the ALJ did not have a qualified psychiatrist or psychologist examine her or review her file. The only psychiatric evidence in the record came from Griffin's treating psychiatrist, Dr. Ravichandran, who supported her claim of disability without qualification. None of the other treating or consulting medical experts cited in the decision was a qualified psychiatrist or psychologist.

Having determined that the ALJ erred in these two respects, the court must still determine whether these errors were harmless. Relief is not available unless the legal errors affected the claimant's substantial rights. *Mays v. Brown*, 837 F.2d 1362, 1364 (5th Cir. 1988) ("Procedural perfection in administrative proceedings is not required" so long as "the substantial rights of a party have not been affected."). Griffin contends that the deficiencies in the ALJ's decision are not harmless, because her

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<sup>14</sup> TR. 271, 337.

mental impairment in fact meets the Listing level criteria set forth in 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.02. Specifically, she cites evidence pertaining to Listing criteria A (cognitive difficulties such as memory impairment) and B (marked restrictions in activities of daily living and social functioning), which arguably mandates a step 3 finding of disability.<sup>15</sup> This evidence includes:

1. Clinical evidence of abnormality in the right parietal region of the brain as reflected in the July 2005 nuclear brain scan;<sup>16</sup>
2. Progress notes from her treating psychiatrist Dr. Ravichandran indicating symptoms of anxiety, depression, panic attacks, paranoia, persistent insomnia, and hallucinations;<sup>17</sup>
3. Notes from her treating neurologist, Dr. Rossi, that Griffin experienced “some memory problems, forgetful, confused”;<sup>18</sup>
4. Lay testimony from claimant’s sister corroborating her short term memory loss, as well as persistent and debilitating crying spells;<sup>19</sup>

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<sup>15</sup> Griffin (rightly) refrains from arguing that the current record satisfies criterion C, which *inter alia* requires “[m]edically documented history of a chronic organic mental disorder of at least 2 years’ duration. . .” Listing 12.02(C). The medical records suggest that her mental impairment commenced in the spring of 2005, less than one year prior to the administrative hearing. TR. 289-90. Given the passage of time, however, the record on remand should be fully developed as to each mental disorder criteria, including criterion C.

<sup>16</sup> Tr. 283.

<sup>17</sup> Tr. 273, 275.

<sup>18</sup> Tr. 280.

<sup>19</sup> Tr. 402-06.

5. The claimant took prescription medication for anxiety and depression;<sup>20</sup>
6. The claimant's own testimony regarding disabling symptoms and limitations;<sup>21</sup>
7. Dr. Ravichandran's opinion dated November 16, 2005 that Griffin is "totally and permanently 100% disabled" and that "[h]er psychiatric and neurological problems are long term and are expected to last more than [sic] twelve months."<sup>22</sup>

While certainly suggestive, this evidence is not conclusive. The ALJ accused Griffin of exaggerating and misrepresenting her symptoms and limitations in a conscious attempt "to increase the chance of obtaining benefits."<sup>23</sup> In support of this charge he cited a January 2004 evaluation by a consulting orthopedic specialist, Dr. Gary Freeman, who performed a limited medical examination directed at the specific condition of her right wrist.<sup>24</sup> But neither Dr. Freeman nor any of the other physicians on which the ALJ relies were asked to evaluate Griffin's mental impairment, which

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<sup>20</sup> Tr. 288, 290.

<sup>21</sup> Tr. 384-400.

<sup>22</sup> Tr. 337.

<sup>23</sup> Tr. 25.

<sup>24</sup> Tr. 209. This report is remarkable for its sarcastic tone and ill-concealed contempt for the claimant, portrayed as an inveterate malingerer. It concludes with a cynical and gratuitously insulting prediction: "Although the claimant may appear to be fit for return to work, there is no guarantee that the examinee will not report a re-injury once she returns to work." Tr. 211. The author's apparent bias was recognized during the hearing by the ALJ, who described Dr. Freeman as "a carrier-required medical examination doctor, basically not necessarily a friend to a Worker's Comp injury claimant." Tr. 416.

was not diagnosed until 2005, well after they had seen her. Even had they been aware of this diagnosis, none of them were psychiatrists or neurologists specially trained to evaluate mental impairments. The medical expert who testified at the hearing, orthopedics specialist Dr. Wes Scott, repeatedly stressed that his evaluation of the medical records was “from an orthopedic standpoint.”<sup>25</sup>

The ALJ expressly rejected Dr. Ravichandran’s opinion of total disability on grounds that it is conclusory, does not cite supporting medical evidence, and “contrasts sharply with the other evidence of record.”<sup>26</sup> Ironically, the ALJ’s own decision suffers from precisely the same defects. We are left to guess what “other evidence of record” negating Griffin’s mental impairment there might be. Dr. Ravichandran is the claimant’s treating psychiatrist, and for all the record shows he is the *only* psychiatrist to have evaluated her. His progress notes reflect symptoms of mental impairment, as do the notes of Dr. Rossi, the claimant’s treating neurologist. Most significant of all is the clinical evidence of organic brain syndrome and encephalopathy, *i.e.*, the abnormal brain activity revealed by the nuclear brain scan in July 2005. The ALJ simply ignores all this evidence in claimant’s favor.

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<sup>25</sup> Tr. 408, 409.

<sup>26</sup> Tr. 25.

The Commissioner's brief attempts to fill the gap by pointing to a cranial MRI performed in August 2005 which identified "no acute intracranial brain abnormality." TR. 278. The significance of this clinical evidence is unexplained on this record, however. The Commissioner suggests that this study calls into question the results of the earlier nuclear brain scan, but the record is utterly silent on the point. Perhaps these two studies measured different things, perhaps one is technically superior to the other, or perhaps they are not incompatible at all. This record yields no answer to these questions, nor any clue about how the ALJ might have answered them, if he considered them at all.

While Griffin has not demonstrated conclusively that she met the requirements of Listing 12.02, she has unquestionably put forth sufficient evidence of mental impairment<sup>27</sup> and resulting limitations to warrant the conclusion that the ALJ's legal errors were not harmless. Additional psychiatric or psychological evidence may well have confirmed the existing record evidence of mental impairment, resulting in a finding of disability under either step 3 or step 5 of the sequential analysis. Absent

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<sup>27</sup> For the same reason, the Commissioner's argument that the ALJ need not consider Griffin's mental impairment because she did not initially complain of organic brain disorder is untenable. SSA regulations require the agency to consider "only impairment(s) you say you have *or about which we receive evidence.*" 20 C.F.R. § 404.1512(a) (emphasis supplied). Griffin's attorney raised the mental impairment issue at the hearing (Tr. 374), and the ALJ's express finding of severe mental impairment tacitly concedes that evidence of such an impairment was received.

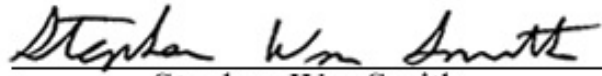
some explanation from the ALJ to the contrary, even the existing record would appear to satisfy the requirements of Listing 12.02. Because her substantial rights have been affected, Griffin is entitled to a remand for further proceedings before the Commissioner.

### **Conclusion and Recommendation**

“These facts cry out for confirmation or refutation by a qualified expert psychiatrist.” *Davis v. Califano*, 599 F.2d 1324, 1326 (5th Cir. 1979). By failing to explain his decision adequately or to develop the record fully and fairly regarding Griffin’s mental impairment, the ALJ committed legal errors affecting her substantial rights. The court recommends that the Commissioner’s decision be REVERSED and REMANDED pursuant to 42 U.S.C. § 405(g) sentence four for further proceedings consistent with this opinion.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. P. 72.

Signed at Houston, Texas, on December 28, 2007.

  
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Stephen Wm Smith  
United States Magistrate Judge